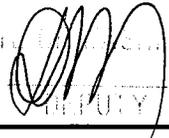


COURT OF APPEALS
DIVISION II

COURT IN ROOM 113

STATE OF WASHINGTON
BY:  DEPUTY

No. 39372-7-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

James Omsa, an individual

Respondent,

v.

Joseph and Bertha Martin, husband and wife,

Appellant,

v.

Barbara Rosenthal, an individual

Third Party Defendant.

BRIEF OF RESPONDENT OMSHA

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INTRODUCTION

The Appellants Joseph and Bertha Martin fail to assign error to the Trial Court's ruling on the disputed factual evidence concerning a purported Stipulation of the parties.

The Martin's argue that: "*Application of the Mandatory Arbitration Rules to the facts is a question of law subject to De Novo review on appeal.*" The Martins' entire appeal is based on the presumption that the Mandatory Arbitration Rules apply to this matter, when in fact the Trial Court weighed factual evidence and found that the MARs did not apply.

This appeal does not turn on a question of law. The Trial Court adjudicated issues of fact. The Trial Court decided which testimonial evidence to accept and which to reject. The Court made findings as to the existence and substance of a purported CR 2A Stipulation. Martin does not assign error to the Trial Court's findings, which precisely support the Trial Court's conclusion of law that the MARs do not apply to this case. This is fatal to the Martins' appeal and requires affirmation of the Trial Court's Order.

**ISSUES PERTAINING TO ASSIGNMENT OF ERROR BY
APPELLANT**

1. Did the Trial Court consider disputed evidence and make factual determinations?
2. Were the factual determinations of the Court supported by competent evidence of record?
3. Have the Trial Court's factual determinations been appealed?
4. Do the factual determinations, as verities, support the Trial Court's Conclusion of Law that the Mandatory Arbitration Rules do not apply?
5. Did the Trial Court properly deny Appellant Martins' Motion for an Award of Attorney Fees based on MAR 7.3?

STATEMENT OF THE CASE

A. Factual Background

Respondent James Omsa owns Lot 14 of Claremont at Westgate Division, commonly known as 3112 North Viewmont in Tacoma. CP 1. Appellants, Joseph and Bertha Martin own Lot 13 of Claremont in Westgate Division, commonly known as 3102 North Viewmont in Tacoma, Pierce County, Washington. CP 2. The Martins and Mr. Omsa are neighbors. The common boundary line includes a line of arborvitae

hedges and other features. *Id.* A portion of the boundary had been fenced and a planter had been installed on Mr. Omsa's side of the fence. To protect the hedge and quiet title to lands on Mr. Omsa's side of the fence, a fence which had stood since before 1995 unchallenged (CP 2), Mr. Omsa brought an action alleging, *inter alia*, timber trespass, injunction and an order quieting title. CP 1-4. Mr. Omsa Complaint was later amended to add a claim of nuisance. CP 9-13.

B. Proceedings Below

The Martins' statement of the "Proceedings Below" is substantially correct. However, an accurate understanding requires the following supplementation.

After the parties unsuccessfully brought Cross Motions for Summary Judgment, the parties desired to avoid the lengthy delay on the trial calendar and wished to arbitrate. CP 200. Because Mr. Omsa's Amended Complaint (CP 9-13) requested some non-monetary relief, it did not initially appear to be transferable to the Pierce County Superior Court Mandatory Arbitration Department. CP 198-200. In July 2008, the parties prepared a written agreement to arbitrate the entire case pursuant to RCW 7.04 (as distinct from RCW 7.06, Mandatory Arbitration). CP 55.

Several months later, the parties determined that, by stipulation, they could vest an arbitrator appointed under the Pierce County Superior

Court Mandatory Arbitration Rules with authority to include non-monetary relief in the Arbitrator's Award.

Instead of proceeding under the original written agreement for Arbitration (CP 55), the Martins drafted the Stipulation and Order transferring the case to Arbitration pursuant to the Pierce County Superior Court Mandatory Arbitration Rules. CP 209-213. The Stipulation and Order drafted by Appellants made no reference to binding Arbitration pursuant to RCW 7.04. The Stipulation and Order made no reference to the prior agreement (CP 55) for Arbitration pursuant to RCW 7.04.

Instead the Stipulation as drafted by the Martins provided:

COME NOW Plaintiff, James Omsha, by and through the Law office of David J. Britton, and David J. Britton, and Defendants, Bertha and Joseph Martin, by and through Dickson Steinacker LLP, and Shane L. Yelish, and Third-Party Defendant, Barbara Rosenthal, by and through McGavick Graves, PS, and Henry Hass and Brian L. Green, and stipulate to the following order that **the above-referenced case will be transferred to Mandatory Arbitration pursuant to MAR 8.1.**

CP 209-213 (Emphasis Added).

The Order as drafted by the Martins stated:

The portion of the above-captioned case between Plaintiff James Omsha and Defendants Joseph and Bertha Martin **will enter Mandatory Arbitration pursuant to MAR 8.1(b)**, which provides that the parties may stipulate to enter into arbitration in a civil matter that would not otherwise be subject to arbitration provided that the third-party complaint shall not be submitted to arbitration.

Id. (Emphasis added).

When the Order was presented to the Court, the prior Agreement, which contemplated Arbitration under RCW 7.04 (CP 55), was not appended or otherwise made a part of the record considered by the Trial Court. CP 209-213. Without consideration of the prior agreement (CP 55) to arbitrate pursuant to RCW 7.04, the Trial Court signed the Stipulation and Order for transfer *pursuant to MAR 8.1* on September 15, 2008 as drafted by the Martins. CP 210.

Once the transfer occurred and an arbitrator was assigned, the case proceeded in all respects as though it was governed by the Mandatory Arbitration Rules. CP 199. Nowhere does the record reflect that the Arbitrator saw the prior Agreement contemplating RCW 7.04 Arbitration. CP 55. The Arbitrator's (original) Award does not refer to any prior stipulation to Arbitration under RCW 7.04. CP 186-171. The Arbitrator's (original) Award does not recite that it is final and binding nor does it recite that any stipulation was made during the Arbitration proceeding. *Id.* Consistent with cases proceeding under the Mandatory Arbitration Rules, the Arbitrator was required to indicate whether any part of the award was based on the failure of a party to participate, which he answered by

making an “X” in the “No” box at the end of his (original) Award. CP 170.

After the Arbitration Award was received, Mr. Omsa, who was represented by Attorney David Britton, filed a Request for Trial De Novo pursuant to MAR 7.2. CP 29-33. After the Martins received the timely and properly filed Request for Trial De Novo, the Martins chose to assert the existence of a CR 2A Stipulation. The Martins claimed that a CR 2A Stipulation had been reached in the Arbitrator’s presence. CP 52. The Martins claimed that this purported CR 2A Stipulation essentially made the RCW 7.06 Arbitration final and binding as though it had been conducted under RCW 7.04. *Id.*

The Martins simultaneously filed two motions; (1) a Motion to Strike Plaintiff’s Request for Trial De Novo (CP 38-49) and (2) a Motion for Leave to Amend Arbitration Award. CP 63-64.

A factual dispute erupted between the parties. Conflicting testimony, presented by declaration, was considered by the Trial Court. CP 50-59, CP 74-78, CP 195-197, CP 198-202 and CP 203-205. The conflicting testimony will be reviewed *infra*.

The Martins’ Motion to Strike Plaintiff’s Request for Trial De Novo was DENIED, but the Martins’ Motion for Leave to Amend was GRANTED. The Martins then brought a Motion for Reconsideration of

the Trial Court's decision to deny their Motion to Strike Plaintiff's Request for Trial De Novo (CP 63-73) based on the Amendment to the Arbitration Award the Martins obtained.

The Trial Court considered the conflicting testimony (CP 50-59, CP 74-78, CP 195-197, CP 198-202 and CP 203-205) and adjudicated the factual dispute between the parties, ruling that the factual evidence compelled the finding that there was a stipulation, albeit disputed as to content, to engage in binding Arbitration. CP 81-82. In addition to finding that there was a stipulation, the Trial Court ruled, "...on the reconsideration, I found that the MAR rules didn't apply..." RP 12:4-5. Mr. Omsa's Request for Trial De Novo was dismissed on the Martins' Motion for Reconsideration. CP 81-82.

Although the Martins had argued before the Trial Court that the Mandatory Arbitration Rules did not apply and that Mr. Omsa had no right to demand a Trial De Novo, the Martins, then moved for an award of attorneys fees pursuant to MAR 7.3 (CP 83-88), even though the Trial Court dismissed Mr. Omsa's Demand for Trial De Novo upon the finding that, "the MAR rules didn't apply." RP 12:4-5.

The Trial Court ruled:

[T]here's a certain inconsistency because originally when this came in front of this Court, we had -- the parties, previously, had agreed that arbitration would be binding

through their attorneys. Then they decided they wanted the County to pay for it, so they went in under the MAR rules but still went in to the arbitrator and said that it was going to be binding; and everybody, apparently, agreed to that; so **on the reconsideration, I found that the MAR rules didn't apply which means if they don't apply on the trial de novo, they're not going to apply on the attorney fee issue; so at this point, the Court is not going to award either side attorney's fees, and this is -- as far as this Court is concerned, this case is concluded.**

RP 11:20 - 12:10 (Emphasis added).

Judgment was entered on the Arbitration Award with a handwritten note by the Honorable Katherine M. Stolz stating, "Court rules that as Mandatory Rules for Arbitration did not apply to trial de novo, they do not apply to request for attorneys fees." CP 158. The Court emphasized its position by going on record and stating, "All right. I have asterisks down: The Court ruled that as Mandatory Rules for Arbitration did not apply to trial de novo, they do not apply to request for attorney's fees." RP 16:1-4.

After the Trial Court DENIED Martin's Motion for Attorneys Fees (CP 156-158), this appeal by Martin ensued on the single issue: Did the Trial Court err by denying the Martins' motion for attorney fees after finding that the MARs did not apply to this case?

ARGUMENT

I. The Trial Court considered disputed evidence and made factual determinations supported by competent evidence of record.

“The existence and material terms of an agreement are a question of fact”. *In re Marriage of Ferree*, 71 Wn.App. 35, 43, 856 P.2d 706 (1993) (Citations omitted). A proponent, seeking to enforce a CR 2A stipulation has the burden of proof. *In re Patterson*, 93 Wn. App. 579, 583-584, 969 P.2d 1106 (1999). “Findings of fact consist of the judge's decision on the controverted issues of fact in the case, and ‘must cover all the material issues of fact which have been controverted on the trial.’” *Swanson v. May*, 40 Wn. App. 148, 158, 697 P.2d 1013 (1985) (citing 2 L. Orland, *Trial Practice* § 307 (1972 & Supp.1983), *In re Kennedy*, 80 Wn.2d 222, 231, 492 P.2d 1364 (1972) and *Williamson v. United Bhd. of Carpenters & Joiners*, 12 Wn.2d 171, 186, 120 P.2d 833 (1942)). It cannot be denied that the Trial Court considered and adjudicated a factual dispute concerning the existence and material terms of a purported CR 2A Stipulation. The Martins were seeking to enforce a purported Stipulation that the Arbitration was final and binding and could not be appealed.

In an attempt to meet this burden of proof, the Martins presented fact evidence to the Trial Court by a declaration, in which the Martins’ attorney Shane Yelish testified, “The parties to this arbitration stipulated

that the arbitration would be binding and final and waived the right to appeal the arbitrator's award for a trial de novo." CP 52.

In response, Mr. Omsa filed a Declaration denying that a CR 2A Stipulation had been reached at the Arbitration hearing: Mr. Omsa testified that, "At no time during the arbitration did my attorney or I orally agree to, or execute any document, to make the Arbitrator's Award final and binding. At no time during the arbitration proceeding did I or my attorney ever give up my right to a new trial." CP 203. The testimony of Attorney Yelish and Mr. Omsa were in direct conflict.

The factual dispute concerning the existence and scope of the purported CR 2A Stipulation continued as Attorney David Britton, who represented Mr. Omsa at the Arbitration, filed various affidavits, wherein Mr. Britton testified that no such stipulation was reached: "I do not recall having orally agreed to during the hearing, nor did I ever execute any document, that would have had the effect of making the Arbitrator's Award final and binding or would have otherwise impaired Plaintiff's right to a trial de novo." CP 196.

Attorney David Britton further testified, "I advised my client after we received the arbitrator's decision, that he had 20 days to file a motion for trial de novo." CP 199.

The testimony of Mr. Omsa and Mr. Britton is precisely contrary to the factual testimony offered by the Martins through their attorney.

The Court first DENIED Martin's Motion to Strike the Request for Trial De Novo (CP 60-62) but reconsidered based on the Arbitrator's Amendment to the Arbitration Award. CP 79-80. The Amendment essentially stated the Arbitrator's own testimony:

I issued the arbitration award with the understanding that the arbitration was final and binding upon all parties and that all parties waived their right to appeal to the Superior Court for a trial de novo...

During the arbitration, **it was my understanding** that the parties agreed to perform the arbitration pursuant to the Mandatory Arbitration Rules (MAR) for convenience purposes only. **I understood** the agreement to conduct the arbitration was final and binding and that all parties waived their right to appeal to the Superior Court for a trial de novo...

Id. (Emphasis added). The forgoing presents yet another conflicting factual version of what happened; e.g. the "understanding" of the Arbitrator.¹

Upon the Arbitrator filing the Amended Award, the Martins Moved for Reconsideration based on the new testimony presented by the Arbitrator in his Amended Award. CP 63-73.

¹ See Gaskill v. Mercer Island, 19 Wn.App. 307, 576 P.2d 1318 (1978), holding that such a supplement of the record was not proper and should not have been considered by the Trial Court.

Upon review, the Trial Judge made several factual determinations. **First**, the Trial Court determined that the facts demonstrated that an agreement had been reached in the Arbitrator's presence. **Second**, the Trial Court weighed the conflicting testimony and found that the agreement caused the Arbitration to be considered final, as though it had been conducted under RCW 7.04.

Specifically, the Court weighed the competing factual testimony and announced its decision as follows:

“The Court: All right. Well, there's a certain inconsistency because originally when this matter came in front of this Court, we had – the parties, previously, had agreed that arbitration would be binding through their attorneys. Then they decided they wanted the County to pay for it, so they went under the MAR Rules but still went into the arbitrator and said that it was going to be; binding and **everybody, apparently, agreed to that, so on reconsideration, I found that the MAR Rules didn't apply...**”

RP 11:20 - 12:05 (Emphasis added).

After considering the conflicting factual evidence presented by the parties, the Court found that “*everybody, apparently, agreed ...*” Having resolved the factual dispute presented by the conflicting testimony, the Trial Court denied attorney fees and amended the presented Order adding by handwriting that: “Court ruled that as Mandatory Rules for Arbitration did not apply to trial de novo, they do not apply to request for attorney fees.” CP 158.

Even if there is conflicting evidence in the record and a reviewing court might have resolved a factual dispute differently, the appellate court will not overturn a trial court's findings of fact supported by substantial evidence. *State ex rel. Evergreen Freedom Foundation v. Washington Educ. Ass'n*, 11 Wn. App. 586, 613, 49 P.3d 894 (2002) (citing *Org. to Preserve Agric. Lands v. Adams County*, 128 Wn.2d 869, 882, 913 P.2d 793 (1996)). “‘Substantial evidence’ exists when there is a sufficient quantum of proof to support the trial court's findings of fact. [Citation omitted.] Conflicting evidence is substantial if that evidence reasonably substantiates the finding even though there are other reasonable interpretations.” *Guarino v. Interactive Objects, Inc.*, 122 Wn.App. 95, 108, 86 P.3d 1175 (2004) (citing *Sherrell v. Selfors*, 73 Wn.App. 596, 600-01, 871 P.2d 168 (1994), *rev. denied*, 125 Wn.2d 1002, 886 P.2d 1134).

It cannot be denied: The Trial Court decided a factual dispute between conflicting testimonies. Mr. Omsa is disappointed that the Trial Court chose to disbelieve his sworn testimony. Mr. Omsa is disappointed that the Court chose to disbelieve the sworn testimony of his former attorney, David Britton. Mr. Omsa is disappointed that the Court chose to accept and believe the testimony of Atty. Shane Yelish and the statement of “understanding” provided by the Arbitrator. Although Mr.

Omsa is disappointed that his request for Trial de Novo was dismissed, he is quick to recognize that there was evidence supporting the Trial Court's findings and recognizes the impossibility in challenging factual findings made by the Trial Court when the record contains substantial evidence supporting the Court's conclusion that the MARs did not apply. On that basis, he has not filed his own appeal. The Martins have not challenged these factual findings on appeal, and even if they had, they should recognize the difficulty of overturning factual findings of the Trial Court for which they themselves argued.

The Trial Court's conclusion of law, that the Mandatory Arbitration Rules do not apply to this case, is supported by and flows from the Trial Court's adjudication of the underlying factual dispute concerning the existence and scope of the purported Stipulation. The Trial Court's fact rulings have not been appealed nor has error been assigned to the rulings on the facts. The Trial Court's conclusion of law, denying fees because the MARs do not apply, is supported by the unchallenged factual rulings of the Trial Court.

II. The unchallenged factual determinations of the Trial Court are verities on appeal.

A separate assignment of error must be assigned for each finding of fact that is to be considered on appeal. RAP 10.3(g). "It is well-

established law that an unchallenged finding of fact will be accepted as a verity upon appeal.” *In re Contested Election of Schoessler*, 140 Wn.2d 368, 385, 998 P.2d 818 (2000). (Citing *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994)). An appellate court will review only findings of fact to which error has been assigned. *Id.*

The only error assigned by the Martins is to the denial of attorney fees which denial is characterized by the Martins as a pure question of law. Appellants’ Brief, Pg. 6. The Martins have failed to assign error to the facts found by the Court; e.g. that everybody, apparently, agreed that the Arbitration would be final and binding. The factual findings are the basis for the Trial Court’s conclusion of law that: “Court ruled that as Mandatory Rules for Arbitration did not apply to trial de novo, they do not apply to request for attorneys fees.” CP 158.

The Court’s conclusion that the Mandatory Arbitration Rules did not apply was based on the factual determinations reached, after weighing testimonial evidence, particularly, (1) the determination that there was a CR 2A Stipulation and (2) the CR 2A Stipulation made the Arbitration final and binding. Findings of Fact will not be reviewed on appeal unless those findings are the subject of assigned error. The Martins have not assigned error to the Trial Court’s rulings that resolved the conflict

between the factual evidence. Absent assignment of error, those facts are verities on appeal.

This is not a “question of law subject to de novo review on appeal” as argued by the Martins. (Appellants’ Brief, Pg. 6). The Martins presume the application of the MARs and then appeal claiming the Judge did not properly apply the MARs. That argument ignores the substance of the Trial Court’s ruling: After considering conflicting testimony and after adjudicating the factual dispute, the Trial Court concluded that the MARs do not apply. The Martins inconsistently argue that Mr. Omsa waived the right to a Trial De Novo thereby taking the matter out of the MARs. Immediately after arguing that the MARs do not apply to this Arbitration, the Martins then request an award of attorney fees pursuant to MAR 7.3. The Trial Court was quick to recognize the inconsistency of this argument by orally ruling that:

“I found that the MAR Rules didn’t apply which means if they don’t apply on trial de novo, they’re not going to apply on the attorney fee issue, so at this point, the Court is not going to award either side attorney fees, and this is – as far as this Court is concerned, this case is concluded.”

RP 12:4-10 (Emphasis added).

Further, the Court orally ruled, “All right. I have asterisks down: The Court ruled that as Mandatory Rules for Arbitration did not apply to trial de novo, they do not apply to request for attorney fees.” *Id.* at 16:1-4.

The bottom line is simple: Factual verities which have not been challenged preclude consideration on appeal. The facts have been determined. Upon those factual determinations, the Trial Court then properly concluded that the MARs do not apply. The Trial Court ruling should be affirmed.

At this point, review on this appeal could be terminated without consideration of any other argument. To the extent any further answer is required, Mr. Omsa respectfully answers the argument raised in the Martin's Brief as follows:

III. The Trial Court properly denied the Martins' Motion for an Award of Attorney Fees that was based on MAR 7.3.

Statutes awarding attorney fees are in derogation of common law and are to be narrowly construed. *Cosmopolitan Engineering Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 303, 149 P.3d 666 (2006). The Martins argue entitlement to a mandatory award of attorney fees by relying on RCW 7.06.060 and MAR 7.3. The Martins assume that the MARs apply to this case even though the Trial Court determined that the underlying facts did not support that conclusion. Arguendo, if we ignore the Trial Court's factual determination that the MARs do not apply to this case, MAR 7.3 and RCW 7.06.060 provide for an award of attorney fees

only where (1) a party “fails to improve the party’s position on the trial de novo” or (2) where a party “voluntarily withdraws a request for trial de novo.” MAR 7.3. In this case there was no final adjudication, no Trial De Novo was conducted and certainly the demand for Trial De Novo was not voluntarily withdrawn.

Because there was no adjudication on Trial De Novo, the Martins focus on failure to improve the filing party’s position or failing to proceed to trial. Appellants Brief, Pg. 9. The Martins argue “Likewise, Washington Courts have interpreted MAR 7.3 as requiring a mandatory award of attorney fees when one requesting a trial de novo does not improve their position at trial because they failed to proceed to trial de novo.” Appellants Brief, Pg. 9. In support of this claim, the Martins rely on three cases. Each is discussed in turn.

First, the Martins rely on *Puget Sound Bank v. Richardson*, 54 Wn. App. 295, 773 P. 2d 429 (1989). This case did not proceed to Trial De Novo because it was adjudicated by a summary judgment. The need for a trial was eliminated only after an adjudication had been reached on the merits. In Mr. Omsa’s case, no adjudication was ever made by the Pierce County Superior Court on the merits.

Second, the Martins rely on *Kim v. Pham*, 95 Wn. App. 439, 975 P. 2d 544 (1999). The case was dismissed without an adjudication

because *Pham* failed to properly follow the procedures for filing a request for Trial De Novo. Essentially, the Court ruled that the filing was defective. The Court stated, “we interpret MAR 7.3 as requiring a mandatory award of attorney fees when one requests a trial de novo and does not improve their position at trial **because they failed to comply with requirements for proceeding to a trial de novo such as MAR 7.1(a).**” *Id.* at 446-447 (Emphasis added). Here, there is no dispute: Mr. Omsha timely and properly filed his request for Trial De Novo. Mr. Omsha’s Request for Trial De Novo was not procedurally defective.

Third, the Martins rely on *Wiley v. Rehak*, 143 Wn. 2d 339, 20 P. 3d 404 (2001). Like in *Kim*, the party requesting Trial De Novo did not follow the time and procedural requirements needed to perfect a demand for Trial De Novo and this was the basis for the Court’s decision to award attorneys fees.

In each of the three referenced cases, there was no dispute as to whether a stipulation had removed the case from the application of the MARs. None of the three referenced cases involved a factual dispute concerning which rules applied.

No Trial De Novo was conducted upon Mr. Omsha’s demand. No summary judgment adjudication was made. No procedural defect was noted. The demand for Trial De Novo was not voluntarily withdrawn.

Instead, the Court decided a factual dispute and found that the parties had waived the application of the MARs by a Stipulation.

CONCLUSION

The Martins vigorously argue that an award of attorney fees is mandatory; however, the Trial Court record shows that the Trial Court Judge was fully advised concerning the tortured course this case traveled.

First, an Agreement was reached between the parties that a private Arbitration would be conducted pursuant to RCW 7.04. CP 55.

Second, that Agreement (CP 55) was apparently superseded when Appellant Martin drafted all of the language in the proposed Stipulation and Order requesting transfer to the Pierce County Mandatory Arbitration Department pursuant to MAR 8.1. CP 209-213. The prior Agreement and the subsequent Stipulation and Order were inconsistent. The Martins did nothing to correct the inconsistency at the time the Stipulation was presented and the Order was entered.

Third, the Martins claim that an oral Stipulation pursuant to CR 2A was reached in the presence of the Arbitrator; however, the Martins took no steps to memorialize the purported CR 2A Stipulation before the Arbitrator. That is why the Arbitrator's (original) Arbitration Award (CP 168-171) was silent concerning the purported Stipulation. To the contrary,

the Arbitrator's Award concluded with the language required to preserve the parties' rights to Trial De Novo and indicated that no part of the award was based on the failure of a party to participate, by way of inputting an "X" in the "No" box at the end of the Award (CP at 170), leading to the conclusion that the right to a Trial De Novo was preserved.

Fourth, the Martins recognized the deficiency in the Arbitrator's Award, which could have been corrected if the Martins had advised the Arbitrator to include the purported Stipulation. Because the Martins did not ask the Arbitrator to include the purported Stipulation in the original award (CP 168-171) the Martins found it necessary to seek the amendment of the original award, but only after Mr. Omsa had requested a Trial De Novo. Accordingly, the Martins moved for leave to amend the Arbitrator's Award.

Fifth, Appellant Martin moved for the dismissal of the demand for Trial De Novo before obtaining an Order to amend the Arbitrator's Award.

Sixth, having subsequently obtained the supplementary writing from the Arbitrator, Appellant Martin found it necessary to move for reconsideration.

It is clear that the Trial Court observed this conduct. In exercising the discretion of the Trial Court, the Court was well positioned to

determine that no attorney fees should be awarded based on the conduct of the Martins. "A trial court's fee award will not be overturned absent an abuse of discretion." *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 335, 858 P.2d 1054 (1993).

The appeal filed by Appellant Martin should be dismissed and the order of the Trial Court should be affirmed. Respondent Omsha should be awarded attorney fees and costs as permitted by RAP 18.1.

Respectfully submitted this 13 day of October, 2009.



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Attorneys for Respondent Omsha.

COUNTY OF KING
CLERK OF COURTS

OCTOBER 14 2009 10:43

STATE OF WASHINGTON
BY [Signature]
DEPUTY

CERTIFICATE OF SERVICE

I, Debi Ryan, declare under penalty of perjury under the laws of the state of Washington that on October 14, 2009 I personally served a copy of BRIEF OF RESPONDENT OMSHA upon the following:

<p>Shane L. Yelish Dickson Steinacker, LLP 1401 Wells Fargo Plaza 1201 Pacific Avencue Tacoma, WA 98042 Facsimile: 253-572-1300</p>	<p>Delivered Via: <input type="checkbox"/> First Class Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> ABC Legal Messenger <input type="checkbox"/> Hand Delivered</p>
--	--

DATED this 14th day of October 2009, at Bellevue, Washington.

[Signature]
Debi Ryan